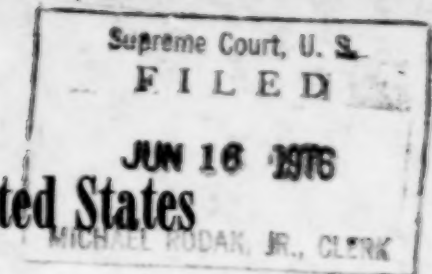


Service of the within and receipt of a copy thereof is hereby admitted this day of June, A.D. 1976.

IN THE
Supreme Court of the United States



October Term, 1976
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,

Petitioner,

vs.

THE RATH PACKING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

RAY T. SULLIVAN, JR.,
County Counsel,
Riverside County, California,

LOYAL E. KEIR,
Deputy County Counsel,
3535 10th Street, Suite 300,
Riverside, Calif. 92501,

Counsel for Petitioner, Joseph W. Jones, Director of Department of Weights and Measures, County of Riverside, California.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitution, Statutes and Regulations Involved	2
California	2
Federal	2
Statement	3
Summary of Argument	5
Argument	10

I

States Possess Broad Authority Under Their Police Powers to Prevent Unfair Competition and Consumer Fraud by Regulating Weights and Measures of Commodities	10
--	----

II

The Ninth Circuit's Interpretation of the Fed- eral Acts Conflicts With the Standard of Uni- formity of the States	15
A. The Ninth Circuit Has Erroneously Con- strued the Federal Acts as Requiring Ac- curacy of the Contents of Packages	15
B. The Ninth Circuit's Construction of the Federal Acts Is Administratively Un- tenable	18
C. California Uses a Federal Standard in Regulating Weights and Measures	19

ii.

	Page
1. California's Article 5 Follows the Principles of Handbook 67 of the National Bureau of Standards	19
2. Background of Handbook 67	20
3. The Basic Thrust of Handbook 67 and Article 5	22
4. An Analogous Federal Law Supports the Principle of Lot Averaging in Determining Label Accuracy	27

III

In Enacting the Federal Food, Drug and Cosmetic Act and the Federal Wholesome Meat Act Congress Did Not Intend to Oust State Authority With Respect to Weights and Measures of Commodities	29
A. Ouster of State Authority Should Not Be Presumed	29
B. The Legislative History of the Federal Acts Reveals the Intent of Congress to Preserve the Police Powers of the States	30
1. Introductory	30
2. Food and Drug Legislation	30
3. Meat Inspection	32
C. The Purpose of the Federal Food, Drug and Cosmetic Act May Be Determined From the Scope and Detail of the Act	34
D. The Federal Wholesome Meat Act Grants Express (Concurrent) Jurisdiction to the States to Prevent the Distribution of Adulterated and Misbranded Commodities	36

iii.

	Page
1. Introductory	36
2. Provisions as to Concurrent Jurisdiction in 21 U.S.C. 678	39
3. The Detention Provisions of 21 U.S.C. 672 Support the Grant of Concurrent Jurisdiction to the States	41
Conclusion	43

TABLE OF AUTHORITIES CITED

Cases	Page
DeCanas v. Bica, U.S., 47 L.Ed.2d 43, 96 S.Ct. (1976)	12, 29, 30
Ewing v. Mytinger and Casselberry, 339 U.S. 593, 94 L.Ed. 1088 (1949)	35
Federal Trade Commission v. Sperry and Hutchin- son Company, 405 U.S. 233, 31 L.Ed.2d 170, 92 S.Ct. 898 (1972)	8, 9, 13
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed. 248, 83 S.Ct. 1210	9, 29
General Mills, Inc., et al. v. Furness, 398 F.Supp. 151 (S.D.N.Y. 1974), aff'd 508 F.2d 536 (2d Cir. 1975)	16, 23, 26
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1,203, 63 L.Ed. 23, 71 (1824)	11
Goldblatt v. Town of Hempstead, 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962)	10
Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R. 2d 1294 (1960)	29
Nielsen v. Oregon, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1908)	38
Passenger Cases, 7 How. 283, 12 L.Ed. 702 (1849)	38
Plumley v. Massachusetts, 155 U.S. 461, 39 L.Ed. 223, 15 S.Ct. 154 (1894)	11
Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947)	29
Savage v. Jones, 225 U.S. 50	32

	Page
Schwartz v. Texas, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232 (1952)	29
The Great A. and P. Tea Co. Inc. v. Cottrell, U.S., 47 L.Ed.2d 55, 96 S.Ct. (1976)	13
United States of America v. 500 Pounds, More or Less, of Veal and Beef, 319 F.Supp. 966 (N.D. Cal. 1970)	41, 42
United States v. Dotterweich, 320 U.S. 277, 88 L. Ed. 48, 64 S.Ct. 134 (1943)	11
United States v. Lanza, 260 U.S. 377, 67 L.Ed. 314, 43 S.Ct. 141 (1922)	38, 39
United States v. Park, 421 U.S. 658, 44 L.Ed.2d 489, 95 S.Ct. 1903 (1975)	11
United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 77 L.Ed. 175, 53 S.Ct. 42 (1932) ..	25
Vigliotti v. Pennsylvania, 258 U.S. 403, 66 L.Ed. 686, 42 S.Ct. 330 (1921)	38
Wedding v. Meyler, 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570, 66 L.R.A. 833 (1903)	38
Miscellaneous	
Hearings before Subcom. of House Committee on Appropriations for fiscal 1975, 93rd Cong., 2d Sess., Commerce, p. 923	22, 25
Hearings before Subcom. of House Committee on Appropriations for fiscal 1976, 94th Cong., 1st Sess., Commerce, pp. 572, 573, 574	14, 21, 25
House Report No. 807, 80th Cong., 1st Sess., July 8, 1947	32
House Report No. 2118, 59th Cong., 1st Sess., March 7, 1906	30

	Page
House Report No. 4071	32
Report No. 94-684, 94th Cong., 2d Sess., Con- sumer Food Act of 1976, pp. 1-4	7, 12
Senate Report No. 799, 90th Cong., 1st Sess., 1967 U.S. Code Cong. and Adm. News 2207	32
1967 U.S. Code Cong. and Adm. News, pp. 2208, 2210	33

Regulations

9 Code of Federal Regulations, Sec. 317.2(h) (2), p. 503	3, 26
21 Code of Federal Regulations, Sec. 1.8b(q), p. 17	3, 16, 26
Code of Federal Regulations, Title 21, Sec. 317.2 (h)(2)	17
Code of Federal Regulations, Title 40, Sec. 162.104	27, 28

Statutes

Administrative Code of the City of New York, Sec. 833-16.0	24
4 California Administrative Code, Chap. 8, Sub- chap. 2, Art. 5	2, 7, 10, 16, 17, 19, 22, 24, 25, 26, 28, 29, 39
California Business and Professions Code, Sec. 12211	2, 7, 10, 40, 31
California Labor Code, Sec. 2805(a)	12
Federal Food, Drug and Cosmetic Act, Sec. 301(k)	32
Federal Food, Drug and Cosmetic Act, Sec. 304(a)	32

	Page
Federal Trade Commission Act, Sec. 5	8, 13
Food and Drug Act of 1906, 34 Stat. 768	34
Public Law 90-201, 81 Stat. 584, 21 U.S.C. 601 (Dec. 15, 1967)	32
31 Statutes at Large, p. 1449	6, 20
32 Statutes at Large, p. 826	21
52 Statutes at Large, p. 1047	2, 15
61 Statutes at Large, p. 163	27
78 Statutes at Large, pp. 190, 193	27
80 Statutes at Large, p. 1296	3
81 Statutes at Large, p. 584	3, 16
81 Statutes at Large, p. 587	33
81 Statutes at Large, p. 600	3, 9
Statutes of 1939, Chap. 43, p. 450	2
Statutes of 1949, Chap. 1384, p. 2407	2
Statutes of 1957, Chap. 1658, p. 3038	2
Statutes of 1963, Chap. 353	2
United States Code, Title 7, Sec. 135(a)	27
United States Code, Title 7, Sec. 135(a)(2)(c)	27
United States Code, Title 15, Sec. 271	20
United States Code, Title 15, Sec. 272	6, 20
United States Code, Title 15, Sec. 1451	3
United States Code, Title 21, Sec. 331	36
United States Code, Title 21, Sec. 333	36

	Page
United States Code, Title 21, Sec. 334	36
United States Code, Title 21, Sec. 341	36
United States Code, Title 21, Sec. 343	15, 36
United States Code, Title 21, Sec. 343(a)	2, 37
United States Code, Title 21, Sec. 343(e)	2, 27, 37
United States Code, Title 21, Sec. 601	16, 17
United States Code, Title 21, Sec. 601(n)(1)	3, 37
United States Code, Title 21, Sec. 601(n)(5)	3, 27, 37
United States Code, Title 21, Sec. 602	33
United States Code, Title 21, Sec. 672	41, 42, 43
United States Code, Title 21, Sec. 678	3, 9, 37, 38, 39, 40, 43
United States Code, Title 21, Secs. 301-392, Subchap. I	35
United States Code, Title 21, Sec. 301, Subchap. II, Secs. 321-321(c)	35
United States Code, Title 21, Subchap. III, Secs. 331-337	35
United States Code, Title 21, Subchap. IV, Secs. 341-348	35
United States Code, Title 21, Subchap. V, Secs. 351-360	35
United States Code, Title 21, Subchap. VI, Secs. 361-364	35
United States Code, Title 21, Subchap. VII, Secs. 371-377	35, 36

	Page
United States Code, Title 21, Subchap. VIII, Sec. 381	36
United States Code, Title 21, Subchap. IX, Sec. 391	36
United States Code, Title 21, Subchap. IX, Sec. 392	36
United States Code, Title 28, Sec. 1254(1)	2
United States Constitution, Art. 1, Sec. 8, Clause 5	6
United States Constitution, Art. 6, Clause 2	2
United States Constitution, Tenth Amendment	5, 10
United States Constitution, 18th Amendment	38
United States Constitution, 18th Amendment, Sec. 2	38
Volstead Act, 41 Statutes at Large, Chap. 83, p. 305, 66th Cong., 1st Sess.	38
Textbooks	
50 Corpus Juris Secundum, p. 1091	38
Feighnan, Representative, Congressional Record, 10/31/67, pp. 30517, 35354	42, 43
6 Law and Contemporary Problems (Duke Univ. School of Law, 1939), p. 28	35
6 Law and Contemporary Problems (Duke Univ. School of Law, 1939), pp. 70, 75	34, 35
National Bureau of Standards, Handbook 67	6, 7, 19, 20, 21, 22, 23, 24, 25, 26, 28
5 Witkin, Summary of California Law (8th ed.), p. 3793	11
8 Words and Phrases, p. 608	38

IN THE
Supreme Court of the United States

October Term, 1976
No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,

Petitioner,

vs.

THE RATH PACKING COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinions of the Court of Appeals (Pet. App. 1-55)¹ are reported at 530 F.2d 1295 and 530 F.2d 1317.

Jurisdiction.

The judgments of the Court of Appeals were entered October 29, 1975 (S. App. 1, 35). The Petition for

¹References to the Single Appendix will be abbreviated as "S. App."; to the Appendix attached to the Petition as "Pet. App."; and to the Appendix attached to the Amici Curiae Brief filed by the Attorney General in support of the Petition as "A. Gen. A.C. Brf. (Pet.) App."

a Writ of Certiorari was filed January 26, 1976, and was granted April 19, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Question Presented.

Whether enforcement provisions of the California statutes and regulations pertaining to accuracy of weights and measures are preempted by Federal laws pursuant to Article 6, Clause 2, of the Constitution of the United States.²

Constitution, Statutes and Regulations Involved.

California.

Business and Professions Code, section 12211, Stats. 1939, c. 43, p. 450, as amended Stats. 1949, c. 1384, p. 2407; Stats. 1957, c. 1658, p. 3038; Stats. 1963, c. 353 (Pet. App. 69);

4 California Administrative Code, Chapter 8, Subchapter 2, Article 5 (Sometimes referred to in the text as "Article 5") (Pet. App. 70).

Federal.

Constitution of the United States, Article 6, Clause 2 (footnote 2);

52 Stat. 1047, 21 U.S.C. section 343(a) and (e) (Pet. App. 90);

²Art. 6, Clause 2. *Supreme Law of Land.*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

81 Stat. 584, 21 U.S.C. section 601(n)(1) and (5) (Pet. App. 91);

81 Stat. 600, 21 U.S.C. section 678 (Pet. App. 91);

80 Stat. 1296, 15 U.S.C. sections 1451 *et seq.*;

9 Code of Federal Regulations, section 317.2 (h)(2), page 503 (Pet. App. 93);

21 Code of Federal Regulations, section 1.8b (q), page 17 (Pet. App. 92).

Statement.

Petitioner, Joseph W. Jones, will hereafter be referred to as "Jones." Respondent, The Rath Packing Company, will be referred to as "Rath"; and respondents, General Mills, *et al.*, will at times be referred to as the "millers." Concurrently with the filing by Jones of his Petition to this Court (Docket No. 75-1053) L. T. Wallace [successor to C. B. Christensen] as Director of Food and Agriculture of the State of California, and M. H. Becker, as Director of the County of Los Angeles Department of Weights and Measures, filed a separate Petition for a Writ of Certiorari involving only The Rath Packing Company as a respondent (Docket No. 75-1052). The latter Petition is still pending for disposition. However, the entire record of the District Court and Court of Appeals underlying case No. 75-1052 has been filed here along with the record underlying case No. 75-1053, and appropriate portions of the records in both cases have been included in the Single Appendix.

All of the respondents are producers, processors, and packagers of food products, are engaged in interstate commerce and do business in California (S. App.

2, 7). Jones is the Director of the Department of Weights and Measures in Riverside County, California (S. App. 2, 7). He is authorized to inspect stores and other sales outlets to detect violations of the California laws pertaining to weights and measures of commodities, including packaged food products, sold to wholesalers, retailers, and consumers (S. App. 38, 39). The purpose of such inspections is to guard against unfair competition and consumer fraud.

This proceeding arises under the Federal Wholesome Meat Act of 1967, the Federal Food, Drug and Cosmetic Act, the Federal Fair Packaging & Labeling Act, and the California Business and Professions Code. It involves the unfair competition and consumer protection provisions of weights and measures laws. The immediate subjects of the actions are short-weight packages of meat food products and wheat flour packed by the respective respondents (S. App. 19, 47, 48, 54, 55).

Jones policed the weights of the food packages by examining sample packages taken from groups of apparently identical packages (lots), according to California regulations requiring accuracy on the lot average.

Lots determined by Jones to be short weight or short quantity on the average were ordered "off sale" (S. App. 20). A lot marked off sale could be rectified by removal of sufficient short-weight or short-quantity packages to bring the lot average up to the labeled quantity (S. App. 39).

Respondents contended in the Courts below that the California statute and regulations are in conflict with, and preempted by, federal statutes dealing with packaged commodities misbranded as to labeled quan-

tity. The respondents sought declaratory relief and further sought to enjoin Jones from enforcing the California regulations through the process of ordering the merchandise off sale (S. App. 6, 51).

In two separate proceedings, the first one involving Rath, the second one, the three milling companies, the United States District Court for the Central District of California granted the respondents' respective motions for summary judgment (Pet. App. 53 and 58), and the judgments were affirmed by the United States Court of Appeals for the Ninth Circuit in two separate opinions filed on October 29, 1975 (Pet. App. 1-52).

Summary of Argument.

In contending that the preemption rule does not apply here, petitioner starts with the basic premise that the California weights and measures regulations, prohibiting unfair competition and unfair or deceptive acts or practices, derive their force from the police powers originally belonging to the States and preserved to them by the 10th Amendment. Historically food products have been subject to State regulation, and there are cogent factors that bring them within the *mainstream* of the State's police powers. In general, weights and measures assurance is so basic a right that it antedates our nation's Constitution, and, indeed, dates back to the Magna Carta. Standards of weights and measures were applied then, as now, at the time and place of sale.

Effective governmental control of weights and measures, whether it be of food products or any other commodity, is essential to any advanced society. Such control has two parts; first, the setting of physical

standards, such as the mass of the pound and the volume of the gallon; and second, enforcement to assure that full measure is in fact given at the time and place of sale. Both parts are necessary to prevent unfair competition and fraud on purchasers.

From the beginning of our nation the principles of the Magna Carta have prevailed among the States. The Secretary of Commerce, of course, sets the standards of weights and measures pursuant to Article I, Section 8, Clause 5, of the Constitution and 31 Stat. 1449, 15 U.S.C. 272. Under 15 U.S.C. 272, first enacted in 1901, the Secretary has been authorized to cooperate (through the National Bureau of Standards) "with the states in securing uniformity in weights and measures laws and methods of inspection." Furthermore, since 1905, the National Bureau of Standards, through the National Conference on Weights and Measures, has constructed a web of interconnected use procedures pursuant to 15 U.S.C. 272 which are enforced by the States.

An important part of the National Bureau of Standards system is the inspection of packaged commodities. The Bureau estimates the national transactions subject to weights and measures at \$900 billion annually, a substantial part of which involves packaged goods. Packages of food products involved in the Ninth Circuit opinions are an important part, but only a part, of the products covered by State weights and measures inspection.

California, like the overwhelming majority, if not all, the states, uses the principles of the National Bureau of Standards *Handbook 67* for inspecting packaged commodities. The principles applied by petitioner Jones

in making the inspections in question are set forth in Section 12211 of the California Business and Professions Code and 4 California Administrative Code, Chapter 8, Subchapter 2, Article 5, commonly referred to as "Article 5." The standard under Handbook 67 and Article 5 is accuracy on the average of the lot (of packaged commodities) *at the time and place of sale*. The volume and variety of packages in commerce preclude effective enforcement according to the Ninth Circuit's theory of package-by-package inspection. Enforcement by lots of the same product (apparently identical packages in the same place) is most necessary. Accuracy in each package is too expensive to be compatible with good manufacturing and distribution practice. Reasonable variations from accuracy of packages, both over and under, are allowed as to individual packages because of the nature of packaging machinery and the need to slightly overpack certain products which may lose moisture during distribution.

There is little weights and measures inspection by federal officials in either the foreign or domestic plants, and even less enforcement, Report No. 94-684, 94th Congress, 2d Session, Consumer Food Act of 1976, pages 1-4. Considering that the Food and Drug Administration inspects food packaging plants on the average of about once every five to seven years, *ibid.* 4, and primarily for adulteration of products, it may fairly be said that self-regulation as to weights and measures, rather than governmental enforcement, prevails in the FDA system.

It thus appears that if accuracy (on the average) of the weight or measure of lots of commodities is to be achieved, such result must be accomplished by the States. Under the States' current enforcement policy

based on the federal standard promulgated by the National Bureau of Standards, enforcement is achieved with mathematical accuracy and applies to all packaged products, without favoritism. Under the Ninth Circuit's principle of package-by-package inspection, both State and federal inspectors would face an impossible task. Since the Ninth Circuit's opinions apply to all products under the Wholesome Meat Act and the Food, Drug, and Cosmetic Act, thousands of products and thousands of packaging plants are involved and the task is one of complete impracticality.

The inevitable result of the lower Court's decisions is to allow *shortages* in "reasonable" amounts for *every package* of every product subject to the Wholesome Meat Act, the Food, Drug and Cosmetic Act and the Fair Packaging and Labeling Act. In other words, a procedure allowing *shortages* is substituted for a procedure requiring *accuracy* of weights and measures.

Petitioner submits that the following results could emerge from an application of the principles laid down by the Ninth Circuit:

1. Inflation across the country on a massive scale as billions of dollars worth of packages become short measure and purchasers have to pay more for the same amount of product.
2. Unfair competition in business on a similar massive scale as State inspectors are enjoined from using any enforceable standard to mark off sale short quantity packages. Section 5 of the Federal Trade Commission Act prohibiting "unfair or deceptive acts and practices" would become a nullity in the most central aspect of commerce. The doctrine of *Federal Trade Commission v. Sperry and Hutch-*

inson Company, 405 U.S. 233, 31 L.Ed.2d 170, 92 S.Ct. 898 (1972), that the Federal Trade Commission Act was designed to prevent such practices would become meaningless.

The error of the Ninth Circuit's holding of preemption is further found in the legislative history, and in the scope and purpose, of the federal Acts, which together contradict the proposition that Congress intended to oust State authority with respect to weights and measures of commodities. In fact, the Federal Wholesome Meat Act, 21 U.S.C. 678, grants express jurisdiction to the States to serve concurrently with the Secretary of Agriculture in preventing the distribution of adulterated and misbranded commodities, including commodities misbranded as to weight or quantity of package contents.

Since California is in stride with her sister States in following a federal standard developed and refined by the Secretary of Commerce, and since there is nothing in the history or scope of the federal Acts indicating that Congress has "unmistakably so ordained" preemption of State laws (compare *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L.Ed.2d 248, 83 S.Ct. 1210), the decisions of the Ninth Circuit should be reversed, and the California statute and regulations should be restored to vitality.

In sum total, the "weight" of the factors supporting the validity of California weights and measures laws and regulations is indeed massive.

ARGUMENT.

I

STATES POSSESS BROAD AUTHORITY UNDER THEIR POLICE POWERS TO PREVENT UNFAIR COMPETITION AND CONSUMER FRAUD BY REGULATING WEIGHTS AND MEASURES OF COMMODITIES.

Petitioner's basic position is that the California statute and regulations³ derive their force from the police powers originally belonging to the States and preserved to them by the 10th Amendment.⁴ Exercise of police power is presumed to be constitutionally valid, and the presumption of reasonableness is with the State. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596, 8 L.Ed.2d 130, 82 S.Ct. 987 (1962) and cases cited (Town of Hempstead, New York, enacted a zoning ordinance regulating the dredging and pit excavating

³The California statute and regulations treated by the District Court and the Court of Appeals as preempted by the federal Acts are California Business and Professions Code, Section 12211 (Pet. App. 69) and 4 Cal. Admin. Code, ch. 8, subch. 2, Article 5, commonly referred to as Article 5 (Pet. App. 70).

Section 12211 provides in part that the county sealer (such as Jones) shall weigh or measure packages of commodities "to determine whether the same contain the quantity or amount represented . . ." It contains the provision:

"Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. . . ."

Article 5 of the California regulations contains the procedure for testing lots as described above in the statement of facts.

⁴Amendment 10—*Reserved Powers to the States*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

on property within its limits). The police powers of the States synchronize with the purposes of food and drug legislation in the sense, as expressed by this Court, that they "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection . . .". *United States v. Park*, 421 U.S. 658, 44 L.Ed.2d 489, 498, 95 S.Ct. 1903, 1909 (1975), quoting from *United States v. Dotterweich*, 320 U.S. 277, 280, 88 L.Ed. 48, 64 S.Ct. 134 (1943).

Historically food products have been a prime commodity for State regulation. "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products [in this case, oleomargarine]." *Plumley v. Massachusetts*, 155 U.S. 461, 472, 39 L.Ed. 223, 15 S.Ct. 154 (1894).⁵

The importance of State regulation becomes particularly apparent when it is recognized that the federal government has simply not been geared for adequate inspection. As late as 1972, according to a General Accounting Office report, food plants were inspected by the Food and Drug Administration on an average

⁵"Regulation of the business of supplying food and drugs, to safeguard health and prevent fraud, is a traditional common exercise of police power." 5 Witkin, *Summary of California Law* (8th ed.), 3793, and cases cited.

Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203, 63 L.Ed. 23, 71 (1824), is a historic statement favoring federal power in the regulation of interstate commerce. Yet, he carefully preserved state sovereignty over the inspection of "articles produced by the labor of the country" (which would implicitly include food products).

of only once every 5 to 7 years.⁶ One can only wonder at the even smaller amount of federal inspection that takes place at the wholesale and retail levels (or possibly whether there is any federal inspection at all for weights and measures at such levels).

The breadth of State authority in a related area of human affairs was recently determined by this Court in the case of *DeCanas v. Bica*, U.S., 7 47 L.Ed.2d 43, 49, 96 S.Ct. (1976). It involved the right of the States under their police powers to regulate the employment relationship to protect workers within the State. This Court was of the opinion that California Labor Code section 2805(a) prohibiting the knowing employment of illegal aliens was within the mainstream of such police power regulations. Factors noted by the Court included the deprivation of citizens and legally admitted aliens of jobs during high unemployment, depression of their wage scales and working conditions, and the lessening of the effectiveness of labor unions.⁸

There are equally cogent factors in the situations at hand that bring them too within the *mainstream*

⁶Report No. 94-684, 94th Cong., 2d Sess., Consumer Food Act of 1976, at page 4.

⁷The Advance Sheets for the official report were not available at the time of this writing; therefore, specific references will be made to the Lawyers Edition report.

⁸In another case decided on the date of the decision in *De Canas v. Bica*, *supra*, this Court took the occasion to discuss the right of a State to inspect, under her own standards, shipments of milk from a sister State (from Louisiana to Mississippi). Milk is subject to the supervision of the Food and Drug Administration no less than flour. Although, in deciding the sole issue in the case the Court determined that, under the Commerce Clause, Mississippi could not refuse the sale of milk solely because Louisiana had failed to sign a reciprocity agreement, it commented on the rights of a State to apply her own inspection laws. As we understood the case, it was this Court's opinion that Mississippi has the right to apply

of police power regulation. To begin with, the consumer comes most readily to mind as the one who loses from a breakdown of the police powers in the field of weights and measures. However, other members of the business community are adversely affected.

For example, effective enforcement is vitally important to wholesalers and retailers. They also buy in packages, although in larger units. The baker who buys 100 50-pound sacks of flour, or the food chain that buys 100 50-pound boxes of beef, are also entitled to receive full quantity as labeled.

Failure to police shortages effectively promotes unfair competition. The packager that shorts the most forces others to lower their standards to his standard or below, and this develops into further shortages. See *Federal Trade Commission v. Sperry and Hutchinson Co.*, 405 U.S. 233, 31 L.Ed.2d 170, 92 S.Ct. 898 (1972), stating that section 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition . . . and unfair or deceptive acts or practices" should be interpreted to protect both consumer and merchants against unfair competition, 405 U.S. at 240-242.

her standards of inspection to shipments of milk from a non-reciprocating State although the milk met the federal standards.

"In the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, Mississippi has the obvious alternative of applying her own standards of inspection to shipments of milk from a nonreciprocating State. *Dean Milk*, *supra*, at 355, 95 L. Ed 329, 71 S Ct 295, expressly supported the adequacy of this alternative: 'such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors.'"

The Great A. and P. Tea Co. Inc. v. Cottrell, U.S., 47 L.Ed.2d 55, at 64, 96 S.Ct. (1976). We see no difference, in terms of applying a State's police powers, between *standards of wholesomeness* as to milk (or any food product) and *standards of weights and measures* as to bacon and flour (or any packaged commodity).

Moreover, there can be financial losses for farmers too because what the packer does not put into the package he does not buy from the farmer. As an example, when a school district buys one-million half-pint containers of milk a week, it provides a market for dairy farmers for the milk poured into the cartons. If the cartons are permitted to be one-half ounce short, there is a loss of market for about 3,800 gallons a week to dairy farmers.

In our complex society there is almost an endless number and variety of enterprises and business activities that must be protected by a weights and measures enforcement program. The problems are particularly acute in California because of the huge amount of business traffic that has accompanied the population explosion which has made California the most populous state in the nation.

Weights and measures assurance is so basic a right that it antedates our nation's Constitution, and, indeed, dates back to the Magna Carta. History indicates that the Magna Carta was forced from King John by the merchants, arising in their day because they needed protection. Merchants need protection today more than ever before.

America's wholesalers, retailers, and consumers today buy and sell on the basis of weights and measures millions of packages of merchandise, including food and other consumer products every day. The National Bureau of Standards estimates the total annual value of commerce governed by weights and measures at 900 billion dollars.⁹

⁹Hearings before Subcom. of the House Committee on Appropriations, Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies, 94th Cong., 1st Sess., Commerce at 573.

The importance of weights and measures to the economy is dramatized by the multi-faceted support given to our Petition filed in this Court. The amici curiae brief prepared by the California Attorney General was submitted by two-thirds of the State Attorneys General, and was supported by the National Association of Retail Grocers of the U.S., Inc., representing the operations of 120,000 retail grocery stores, The American Farm Bureau, and the National Grange, representing the majority of America's farmers, Scale Manufacturer's Association, Inc., representing every major scale manufacturer in the United States, the National Conference on Weights and Measures, composed of weights and measures officials from every State operating under the Secretariat of the National Bureau of Standards, and other public officials, farm and business organizations, and consumer groups.

II

THE NINTH CIRCUIT'S INTERPRETATION OF THE FEDERAL ACTS CONFLICTS WITH THE STANDARD OF UNIFORMITY OF THE STATES.

A. The Ninth Circuit Has Erroneously Construed the Federal Acts as Requiring Accuracy of the Contents of Packages.

The Ninth Circuit's concept of the federal weight standard under the federal Acts and their interpretive regulations¹⁰ is that the federal weight standard requires the accuracy of individual packages and pre-

¹⁰21 U.S.C. 343 [Federal Food, Drug & Cosmetic Act, 52 Stat. 1047] (Pet. App. 90).

§343. *Misbranded food*

"A food shall be deemed to be misbranded—

(a) if its labeling is false or misleading in any particular.

(e) If in package form unless it bears a label containing

(1) the name and place of business of the manufacturer,

(This footnote is continued on next page)

cludes the use of lot averaging. Accordingly, it finds a conflict with the lot averaging system of Article 5 of the California regulations. This may be the key to the lower Court's invalidation of the California statute and regulations. The Court's position is stated in the following passage in the *General Mills* opinion (Pet. App. 48):

"As explained in our *Rath* opinion, §12211 and the regulations in 4 Cal. Admin. Code ch. 8, subch. 2, evaluate compliance with net weight labeling standards solely by determining by statistical sampling techniques the average weight of

packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, that under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary."

21 U.S.C. 601 [Federal Wholesome Meat Act, 81 Stat. 584] (Pet. App. 91).

§601. Definitions

"As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(n) The term 'misbranded' shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular;

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary."

9 C.F.R. 1.8b(q) [relating to 21 U.S.C. 343] (Pet. App. 92):

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

a lot of packages, any of which may weigh more or less than the weight stated on its label. In a sense, by refusing to recognize any of the variations permitted by 21 C.F.R. 1.8b(q), these provisions are stricter than the federal law. But §12211 only proscribes sale of lots of packages whose average actual weights are *less* than the label weights. The federal law requires 'accurate' weight, proscribing packages that are overweight as well as underweight. We recognize that step 10 of the California procedure as described in the *Rath* opinion takes variations of individual packages from accurate weight into account in determining whether lots should be ordered off sale; but these variations are evaluated solely on a statistical basis, and may be greater than, as well as less than, the reasonable variations permitted each package by 21 C.F.R. 1.8b(q) and may arise from circumstances not recognized by the federal regulation. We conclude that §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, do permit the sale of packages of flour that do not comply with federal law."

Both the federal District Court and the Court of Appeals found that Article 5 is statistically valid (Pet. App. 6 and 57).

21 C.F.R. 317.2(h)(2) [relating to 21 U.S.C. 601] (Pet. App. 93).

"The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

B. The Ninth Circuit's Construction of the Federal Acts Is Administratively Untenable.

If the Federal standard is to be administered according to the Ninth Circuit's theory, that is, on the basis of individual package accuracy, then it would become necessary to apply the standard on a product-by-product basis. As a practical matter this is administratively untenable. The real subject here is not merely bacon and flour and the respective packers of such commodities, but rather thousands of products and thousands of competitors. The subject in a sense is commerce generally.

To begin with, the nature of a product is important. For example, the criteria applied to packages of spaghetti in determining "reasonable variations" will differ from those applied to canned stew. The factors would vary also according to whether the product is hygroscopic or nonhygroscopic. Moreover, "good manufacturing practices" may vary according to the location of the packaging plant. To illustrate, chocolate bars are made in Switzerland, England, France, Israel and Canada, to name just a few of the countries that export this product into the United States.

Under the Ninth Circuit's interpretation foreign competitors in hygroscopic products would have an advantage over American competitors in that foreign products could be more short weight than domestic products because of longer distances for distribution. Policing efforts are difficult enough when applied to domestic products. They would become virtually impossible of application when applied to packages packed in foreign lands.

Moreover, manufacturers with inefficient filling capabilities would have a competitive advantage over companies having more accurate systems.

To accept the interpretation of the Ninth Circuit would be to dilute the present standard of uniformity, *i.e.*, accuracy, among the states, into a multiplicity of standards throughout the land.

Furthermore, the requirement of individual package accuracy would create as many standards as there are inspectors. Obviously, this too would be incompatible with uniformity for, even with the best of faith, there would be many different judgments as to reasonableness of shortages. Equally serious would be its effect on the productivity of the state inspectors in terms of the quantity of items inspected on a package-by-package basis and the corresponding braking effect on the over-all enforcement program.

C. California Uses a Federal Standard in Regulating Weights and Measures.

1. California's Article 5 Follows the Principles of Handbook 67 of the National Bureau of Standards.

Contrary to the opinions of the Ninth Circuit, the standard used by California in its enforcement activities against the respondents is a *federal* standard.

Article 5 of the California regulations is substantially similar to, and follows the principles of, Handbook 67, published by the National Bureau of Standards, United States Department of Commerce.¹¹ Handbook 67 is a manual for weights and measures officials for checking prepackaged commodities at the retail level. The overwhelming majority, if not all, of the States either have adopted Handbook 67 as a part of their weights and measures laws or have laws and regulations authorizing [as does California] the use of lot sampling plans comparable to the lot sampling plan of Handbook 67.

¹¹A. Gen. A.C. Brf. (Pet.) App. 3.

2. Background of Handbook 67.

There can, of course, be no debate on the proposition that effective governmental control of weights and measures is essential to any advanced society. Such control is not just weighing, measuring, and counting, but is actually in two parts. First is the setting of physical standards, such as the mass of the pound and the volume of the gallon; and second, is the enforcement to assure full measure.

Both parts are necessary to prevent unfair competition and fraud on purchasers, including consumers. In connection with the first of the above-stated parts, enforcement officials must know the types of scales or meters to use, the tests to determine whether measuring devices are correct, and how to use them. The entire process leads to the attainment of the ultimate objective of *full and accurate measure at the time and place of sale*,¹² a process that has been developed and refined in over 70 years of work by the Secretary of Commerce through the National Bureau of Standards.

Under the Bureau of Standards Act, 31 Stat. 1449, 15 U.S.C. 271 *et seq.* (March 3, 1901), the office of Standard Weights and Measures became known as the National Bureau of Standards.¹³

The Secretary of Commerce has been authorized under 15 U.S.C. 272 to undertake the following activities, among others:

“(5) cooperation with the States in securing uniformity in weights and measures laws and methods of inspection, and

¹²Are the respondents seeking a rule providing in effect that for the first time since Magna Carta of 760 years ago it is not necessary to apply a standard of accuracy *at time and place of sale*, but instead rest upon a standard of inaccuracy?

¹³Shortly thereafter the National Bureau of Standards was transferred from the Treasury Department to the Department

(19) the compilation and publication of general scientific and technical data resulting from the performance of the functions specified herein or from other sources when such data are of importance to scientific or manufacturing interests or to the general public, and are not available elsewhere”

Handbook 67 is an outgrowth of such authorized powers. It is the fifth in a series of Handbooks published by the Department of Commerce through the work of the National Bureau of Standards. It is “designed to present in compact form comprehensive guides for state and local weights and measures officials. . . . It presents an operational guide for the control, under law, of prepackaged commodities. . . .”¹⁴

The Handbook embodies the principle that regulatory authority for the enforcement of weights and measures laws and regulations in the United States rests with State and local jurisdictions.¹⁵ The Federal government, acting through the National Bureau of Standards, provides the leadership and technical resources to State and local weights and measures officials and to “manufacturers, packagers, and consumers that will assure accuracy in commercial quantity determinations; maintain an effective system of fairness and protection for buyer and seller in all commercial transactions involving determination of quantity; promote development and application of new and improved technology in weights and measures; and remove impediments to the free flow of commerce.”¹⁶

of Commerce, under the direction of the Secretary of Commerce, 32 Stat. 826.

¹⁴Preface to Handbook 67 (A. Gen. A.C. Brf. (Pet.) App. 4).

¹⁵Hearings before Subcom. of the House Committee on Appropriations, 94th Cong., 1st Sess., Commerce at 572.

¹⁶*Id.* at 572, 573.

In the process of insuring uniformity the National Bureau of Standards sponsors the National Conference on Weights and Measures, "an organization of State and local enforcement officials and representatives of Federal agencies, business, industry, trade associations, and consumer organizations. The Conference serves as a national forum and develops and adopts model laws and regulations, technical codes, test methods, enforcement procedures, and administrative guidelines."¹⁷

3. The Basic Thrust of Handbook 67 and Article 5.

Handbook 67, which is comparable to California's Article 5, is a basic part of several hundred documents relating to the application of standards of accuracy of the Secretary of Commerce. Typical of such documents is Handbook 44, entitled "Specifications, Tolerances and Other Technical Requirements For Commercial Weighing and Measuring Devices," and Handbook 94, "The Examination of Weighing Equipment." The basic purpose of these Handbooks and other publications of the National Bureau of Standards is to establish standards of accuracy. Handbook 67 serves as a bridge among these many documents for putting into use the standards of accuracy for *packaged commodities*. It combines the "average" concept with random package procedure. "Perfection in either mechanical devices or human beings has not yet been attained; thus the existence of imperfection must be recognized and allowances for such imperfections must be made. These allowances are recognized in the 'average' concept."¹⁸

¹⁷Hearings before Subcom. of House Committee on Appropriations, 93d Cong., 2d Sess., Commerce at 923.

¹⁸Preface to Handbook 67, A. Gen. A.C. Brf. (Pet.) App. 5.

Under Handbook 67 individual package variations are allowed, both over and under the stated quantity, to make the packaging process compatible with good commercial packaging and distribution practices, but the average of the lot at the time of sale must equal the declared net weight, measure, or count. While the fill of an individual container may be under or over the stated net quantity, purchase of several containers, or repeat purchases of single containers, will result in full measure on the average. Individual packages are tested or inspected by a sampling procedure, involving random samples, under which the samples reflect the lot from which they were taken.

The Handbook rejects the position that *every* package must be equal to or above the labeled quantity because it is impractical and too costly for commercial packaging and distribution practice.

The Handbook does not change the accuracy requirement contemplated by the Federal Wholesome Meat Act or the Federal Food, Drug, and Cosmetic Act. It simply provides a more practical and effective method of checking packages through statistical evaluations to achieve the goal of weight accuracy.

Handbook 67 was employed by the Department of Consumer Affairs of the City of New York, as reported in *General Mills, Inc., et al. v. Furness*, 398 F.Supp. 151 (S.D.N.Y. 1974), *aff'd* 508 F.2d 536 (2d Cir. 1975),¹⁹ involving the same milling companies as the respondent millers in the case at bar, who argued for preemption of federal laws. This case was ignored by the Ninth Circuit, notwithstanding that the Second Circuit found no federal preemption.

¹⁹Pet. App. 93-109.

The ordinance challenged by the milling companies in New York was Section 833-16.0 of the Administrative Code of the City of New York which provided in pertinent part:

"It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof . . ."

The District Court ruled that the ordinance as applied in accordance with Handbook 67 did not raise an irreconcilable conflict between local and federal law, and that, therefore, the New York ordinance was not preempted by federal law. "In view of a municipality's interest in regulating weights and measures, 'one of the oldest exercise of governmental power' a city must be afforded wide discretion in determining what variations from stated weights are reasonable." *Id.* at 153.

Handbook 67 could be invalidated by the decisions of the Ninth Circuit because of the following factors (all of which are present in California's Article 5):

(1) It calls for examinations of lots instead of only single packages; (2) it sets numerical limits on the overpacking and underpacking of individual packages in a lot; (3) it requires an *average* net weight or measure *per lot*; (4) it allows larger amounts of overpacking for hygroscopic products (products which may gain or lose moisture) so they will average net weight by lot at time of sale. [By comparison, under the federal standard as interpreted by the Ninth Circuit, each individual package must be judged separately and a "reasonable" amount of *shortage* allowed.]

Accordingly, if, by a parity of reasoning, the laws and regulations of States employing Handbook 67 be-

come unenforceable for reasons applied by the Ninth Circuit to California's Article 5, there will be shortages in the marketplace in a large part of America.

If the package-by-package principle of inspection, as interpreted by the Ninth Circuit, is to supersede the average concept used in Article 5 and Handbook 67, then may it be said that the Secretary of Commerce and his National Bureau of Standards have been wrong all these years? If so, then may it be asked, why has Congress continued to appropriate funds to the National Bureau of Standards to sponsor the updating of Handbook 67? In its 1975 budget request to Congress, the National Bureau of Standards stated that "Revision of the handbook for checking of package quantities for use by Federal, State and local agencies is currently under way. Statistical sampling plans are being developed in fiscal year 1974 and a draft handbook for experimental use will be produced in fiscal year 1975."²⁰ In its 1976 budget request,²¹ the National Bureau of Standards stated that "In fiscal year 1975: (1) revision draft of Handbook 67, Checking Prepackaged Commodities, was circulated for field testing by over 1000 organizations."²²

²⁰Hearings, *supra*, before Subcom. of House Committee on Appropriations for fiscal 1975, 93rd Cong., 2d Sess., Commerce at 923.

²¹Hearings before Subcom. of House Committee on Appropriations for fiscal 1976, 94th Cong., 1st Sess., Commerce at 574.

²²The silent acquiescence of Congress which the Ninth Circuit interprets (Pet. App. 24, 25) as supporting federal preemption based on *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 77 L.Ed. 175, 53 S.Ct. 42 (1932), is really acquiescence in continuation of the long history of State enforcement, because without State laws and State enforcement, there would have been no effective enforcement possible in the United States.

If the Secretary of Commerce has been wrong all these years in rejecting the package-by-package principle of inspections, has he also been wrong in setting up a standard of weights and measures that requires accuracy at the *time and place of sale*?

If not, then the federal regulations in question²³ must be interpreted [if such regulations apply at all to commodities at the consumer trade level] as applying at the *time and place of sale*. And if such interpretation is correct, then there is no conflict between Article 5 and the federal regulations. The provisions of Article 5, like those of Handbook 67, are applied not by looking back into time and space, *i.e.*, looking back to the packaging plant and intermediate points of transit, but by examining the factors at the time and place of sale. To the extent that the Ninth Circuit's decisions in the lower Court's *Rath* and *General Mills* cases conflict with this principle, the Court is in error and should be reversed. The basic 2-pronged administrative practice of (1) determining the average weight of lots of commodities, and (2) examining such lots at the time and place of sale, is a *federal agency practice*, and should be upheld by this Court.

The California standard for weights and measures is at least as strict as the federal standard under the Acts in question, but it is reasonable since it follows the standard developed by the National Bureau of Standards which has withstood the test of time.

²³9 C.F.R. 1.8b(q) (Federal Food, Drug, and Cosmetic Act), and 21 C.F.R. 317.2(h)(2) (Federal Wholesome Meat Act).

4. An Analogous Federal Law Supports the Principle of Lot Averaging in Determining Label Accuracy.

The Federal Insecticide, Fungicide, and Rodenticide Act²⁴ is one of three major federal Acts that deal with the accuracy of weights and measures of packaged products. Section 135(a)(2)(c) providing that the package label must state "the net weight or measure of the content: Provided, that the Secretary may permit reasonable variations," is substantially similar to 21 U.S.C. 343(e) [Federal Food, Drug, and Cosmetic Act] and 21 U.S.C. 601(n)(5) [Federal Wholesome Meat Act of 1967].

The relevant portion of the Environmental Protection Agency's interpretive regulation in 40 C.F.R. 162.104

²⁴61 Stat. 163, as amended by 78 Stat. 190, 193, 7 U.S.C. 135(a):

"It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—

(a) the name and address of the manufacturer, registrant, or person for whom manufactured;

(b) the name, brand, or trade-mark under which said article is sold; and

(c) *the net weight or measure of the content: Provided, That the Secretary may permit reasonable variations*" (Emphasis added).

corresponds to principles of Handbook 67 and Article 5. It states in part:

“§162.104. Interpretation with respect to statement of net contents.

(a) *Requirement of the act.* The act requires that the label of each economic poison bear a statement of the net weight or measure of the contents. . . .

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantity, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the *average net content* unless stated as a minimum quantity. Where *average net content* is used:

(i) The *average content of the packages in any shipment* must not fall below the quantity stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the *average in the content of any package*” (Italics added).

The National Bureau of Standards’ principles of sampling and lot averaging in determining label accuracy as to weights and measures are thus followed - not only by the States but also by the United States Department of Agriculture whose regulatory powers extend to the functions under the Federal Wholesome Meat Act. The Ninth Circuit erred in not recognizing

that Jones was following a federal standard in applying the provisions of California’s Article 5.

III

IN ENACTING THE FEDERAL FOOD, DRUG AND COSMETIC ACT AND THE FEDERAL WHOLESOME MEAT ACT CONGRESS DID NOT INTEND TO OUST STATE AUTHORITY WITH RESPECT TO WEIGHTS AND MEASURES OF COMMODITIES.

A. Ouster of State Authority Should Not Be Presumed.

It is a basic proposition that conflicts between State and federal regulations are not to be sought where none exists. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R. 2d 1294 (1960). It will not be held that a federal statute was intended to supersede the exercise of the power of the State unless there is clear manifestation of intention, since the exercise of federal supremacy is not lightly to be presumed. *Schwartz v. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232 (1952).

The case of *DeCanas v. Bica*, *supra*, U.S. at, 47 L.Ed.2d 43, 50, S.Ct. (1976) contains one of the more recent expressions by this Court that only a demonstration that complete ouster of the States was “the clear and manifest purpose of Congress” would justify the conclusion that Congress intended to preempt State law. The quoted words were used in earlier years in *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963), and in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947).

B. The Legislative History of the Federal Acts Reveals the Intent of Congress to Preserve the Police Powers of the States.

1. Introductory.

In *DeCanas v. Bica*, *supra*, 47 L.Ed.2d at 50, the Court stated that there was no "indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious State regulation touching on aliens in general, or the employment of illegal aliens in particular."

Likewise the federal acts under scrutiny here reveal no intent to preclude the exercise of the police powers of the States to regulate weights and measures of commodities.

2. Food and Drug Legislation.

From the very outset, the purpose of food and drug legislation was in the direction of the consumer rather than the producer or packer. To fully protect the consumer the Congress needed the support of the States. This need was expressed by Congress at the inception of the modern-day food and drug legislation, in H.R. Rep. No. 2118, 59th Cong., 1st Sess., March 7, 1906:

"The bill provides that the law shall be carried out under uniform rules and regulations to be made by the Secretaries of the three departments, to wit: Treasury, Agriculture, and Commerce and Labor. . . . The officials of the National Government having charge of the enforcement of the law will cooperate with the State food, dairy, and drug officials. . . .

It is not proposed by the bill to interfere in any way with the power of the State officials

over local trade, but the purpose of the bill is to give to State officials the aid of the National Government and to receive from the State officials their aid in the enforcement of the national law.

The passage of this bill is in the interest of protecting the weak from the powerful, the poor consumer from the rich manufacturer.

The laboring man or artisan, who knows his own trade, but who may not be an expert in the quality of foods or their imitations or adulterations, is entitled to the protection of the State to the extent that when he purchases an article for the consumption of his family he receives what he pays for, and further, to know that the food which he buys and eats shall give him strength and vigor instead of containing some harmful substance or poison which, in the end, breaks down his health. What is true of such a man is true of all the rest of us. *The public is entitled to protect itself against those who would cheat and defraud it in those necessities of life where one can not tell the spurious from the genuine, either by casual examination or by consumption.*

We think it is the duty of the State to give to the public the measure of protection offered by the provisions of the bill which we have recommended for passage" (*Italics added*).

Congress thus had no intention to interfere with the police powers of the States in the field of local trade. Rather it was contemplated that both the States and the National Government were to be on the front lines concurrently in carrying out their enforcement activities and were to help each other in implementing their respective consumer protection laws.

The Congressional plan shortly after the turn of the century of a cooperative effort between the States and the federal government in protecting the consumer did in fact develop into a reality. This is evident from the report of the House Committee on Interstate and Foreign Commerce to which was referred the bill [H.R. 4071] to make certain technical amendments to sections 301(k) and 304(a) of the Federal Food, Drug and Cosmetic Act, H.R. Rep. No. 807, 80th Cong., 1st Sess., July 8, 1947. The Committee stated that the "enactment of the proposed amendments would not have the effect of excluding State authority in the same field [*Savage v. Jones*, 225 U.S. 50]. The Food and Drug Administration has worked cooperatively with the States, and the amendments are not intended to disturb that relationship. The needs for consumer protection are such as to require at least the combined efforts of federal and local authorities."

3. Meat Inspection.

The basic principles of the Federal Food, Drug and Cosmetic Act were reflected in the Federal Meat Inspection Act, enacted March 4, 1907, and amended by the modern-day Wholesome Meat Act of 1967, Pub. L. 90-201, 81 Stat. 584, 21 U.S.C. 601 *et seq.* (Dec. 15, 1967). "Section 409 would coordinate the Federal Meat Inspection Act with the Federal Food, Drug and Cosmetic Act by providing that the provisions of the former shall not derogate from any authority conferred by the Federal Food, Drug and Cosmetic Act prior to enactment of the bill." Sen. Rep. No. 799, 90th Cong., 1st Session, 1967 U.S. Code Cong. and Adm. News 2207.

The letter from the Secretary of Agriculture to the President of the Senate in 1967 requesting the meat

inspection legislation,²⁵ opened with the following statement: "Transmitted for consideration of the Congress is a draft of a bill to clarify and otherwise amend the Meat Inspection Act, to provide for cooperation with appropriate State agencies with respect to State meat inspection programs, and for other purposes." The Secretary described the economic climate then prevailing as being "highly conducive to the practice of adulteration, deceptive labeling and packaging and a variety of fraudulent activities," and stated that "The object of the proposed bill is to eliminate numerous opportunities now present to defraud consumers and endanger public health." A substantial explanation was given as to the cooperative Federal-State programs involved in the bill and the estimated costs. "We believe," the Secretary concluded, "that the enactment of the bill . . . is urgently needed in the interest of more adequate protection of consumers and other members of the public."²⁶

The Congressional purposes of preventing unfair competition and thereby protecting consumers by cooperation between the Secretary of Agriculture and the States is expressed in the Act itself, 81 Stat. 587, 21 U.S.C. 602.

"The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or

²⁵1967 U.S. Code Cong. and Adm. News 2208.

²⁶*Ibid.* at 2210.

substantially affect such commerce, and that regulation by the Secretary and *cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers*" (Italics added).

A Congressional intent to create a framework of Federal-State cooperation with respect to a meat inspection program would seem to be incompatible with an intent to restrict the States from inspecting meat food packages to protect against the evils of adulteration and short-weighting, even though the packages were packed at a federally inspected, rather than a State inspected, plant. In other words, it would be inconsistent of Congress to be protective of State inspection powers and at the same time silently take them away.

C. The Purpose of the Federal Food, Drug and Cosmetic Act May Be Determined From the Scope and Detail of the Act.

The three basic procedures under the Food and Drug Act of 1906, 34 Stat. 768, regarding adulterated or misbranded foods were (1) judicial criminal proceedings with fine or imprisonment as the penalties, (2) judicial libel (condemnation) proceedings with forfeiture provisions; and (3) administrative proceedings for exclusion of imports. By later amendment of the 1906 Act provision was made for inspection of seafoods. 6 *Law and Contemporary Problems* 70 (Duke Univ. School of Law, 1939).

There is no detention authority under the Act for either adulteration or short-weighting, either in or out

of the packaging plant. A reading of the Act indicates that Congress never really intended to get into enforcement at the distribution level.²⁷

²⁷The entire Act is contained in chapter 9, 21 U.S.C. sections 301-392. Subchapter I, section 301, states the short title; subchapter II, sections 321 to 321(c), contains miscellaneous definitions, including definitions as to butter and milk. Subchapter III, sections 331 to 337, deals with prohibited acts and penalties, including seizures in connection with libel proceedings, but has no provisions for inspection or administrative enforcement. Seizures and the attendant libel for condemnation proceedings under the Act are normally instituted in the following classes of violations: (1) when food products contain poisonous or other harmful ingredients; (2) where food products consist of filthy, decomposed or putrid substances; (3) where foods or drugs are so grossly adulterated with false or fraudulent claims that their distribution creates a serious imposition on the public; and (4) when there are deliberate frauds in the shipment of adulterated or misbranded foods that seriously demoralize legitimate trade practices. Unless a violation falls within one of these classes, seizure action is not taken but the offender is prosecuted criminally. If the violation falls within one of the former classes and is also deliberate, both types of action may be taken: "Enforcement provisions of the Food, Drug, and Cosmetic Act," 6 *Law and Contemporary Problems* 75 (Duke Univ. School of Law, 1939). See also *Ewing v. Mytinger and Casselberry*, 339 U.S. 593, 94 L.Ed. 1088 (1949).

Subchapter IV, sections 341 to 348, is entitled "Food". It spells out the various forms of adulterated and misbranded foods, sets forth tolerances for poisonous substances and pesticide chemicals and deals with oleomargarine sales and food additives. It has no provisions for inspections or administrative enforcement. The misbranding problems with which the government was concerned were mainly problems relating to identity and ingredients of foods. 6 *Law and Contemporary Problems* 28 (Duke Univ. School of Law, 1939).

Subchapter V, sections 351 to 360, and subchapter VI, sections 361 to 364, deal with drugs and cosmetics, respectively, and have no relevance whatever to the case at bar. Subchapter VII, sections 371 to 377, contains general administrative provisions. Section 371 relates to the promulgation of regulations by the Secretary and to hearings in connection therewith. Section 372 provides that the Secretary may conduct examinations and investigations "for the purposes of this chapter", but there are no guidelines in the statute or [as we shall note *infra*] in the regulations. Section 373 involves the furnishing of records

(This footnote is continued on next page)

D. The Federal Wholesome Meat Act Grants Express (Concurrent) Jurisdiction to the States to Prevent the Distribution of Adulterated and Misbranded Commodities.

1. Introductory.

The Federal Wholesome Meat Act not only reflects a complete absence of intent to oust State authority; it in fact expressly *grants* jurisdiction to the States (*i.e.*, "concurrent jurisdiction") under the provisions

of interstate shipment. Section 374 is entitled "Inspection—right of agents to enter; scope of inspection; notice; promptness; exclusions." This section does not apply to inspection of retail stores nor to the inspection of food commodities for purposes of determining weights and measures. The purpose of the inspection can be determined from section 374(b). It states that the inspection officer must give the owner a report (with a copy to the Secretary) indicating that any food, drug, device or cosmetic (1) consists of filthy, putrid, or decomposed substance, or (2) has been prepared or held under unsanitary conditions thereby becoming contaminated with filth or rendered injurious to health. Similarly section 374(d) provides for the obtaining of samples by the inspector for the purpose of determining whether any food consists of putrid or decomposed substances or is otherwise unfit for food. It is thus quite clear that the intent or purpose of section 374 does not relate to weights and measures but rather to physical good health.

Subchapter VIII, section 381, deals with imports and exports. Finally, under subchapter IX, section 391 contains a standard separability clause, and section 392 exempts meat food products from the provisions of the Act.

The regulations set forth in 21 Code of Federal Regulations (C.F.R.) are equally void of any guidance with respect to inspection or enforcement procedures in the area of weights and measures. There are no guidelines as to prohibited acts under 21 U.S.C. section 331, or as to penalties under section 333. The regulations are silent as to seizures under section 334. Likewise there are no guidelines of value with respect to definitions or standards for food under section 341, or as to misbranded food under section 343 except for the definition of reasonable weight variations which was invalidated by the District Court and restored by the Ninth Circuit. Finally, and most significantly, there is no guidance for the inspection of foods under section 374.

of 21 U.S.C. 678,²⁸ to regulate distribution outside the "establishment" to prevent the distribution of commodities which are "adulterated or misbranded." The relevant portion of section 678 is as follows:

" . . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter, may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but *any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded*²⁹ and are outside of such an establishment. . . ." (Emphasis added).

The Ninth Circuit stated that it recognized the above-stated grant of concurrent jurisdiction to the States³⁰

²⁸Pet. App. 91, 92.

²⁹A meat food product is "misbranded" if the label statement as to package contents is "false or misleading," 21 U.S.C. 601(n)(1) [See also 21 U.S.C. 343(a)]. Short-weighting is misbranding, 21 U.S.C. 601(n)(5) [See also 21 U.S.C. 343(e)]. Misbranding can be determined only after examining and comparing the representations on the label with the package contents. If, as indicated by the Ninth Circuit (Pet. App. 28 and 45), there is no substantial difference between "labeling," as used in the first part of section 678, and "misbranding," then the provisions of section 678 which speak of "articles which are adulterated and misbranded" are indeed redundant. Congress must not however be presumed to have performed an idle act in delineating the respective jurisdictional areas of the State and federal governments.

³⁰A substantial body of case law that sheds light on the scope of federal and state authority where a traditional police (This footnote is continued on next page)

and the federal government. But it held that "California cannot exercise its concurrent jurisdiction through the particular standards established by §12211 and Art. 5," because, in the opinion of the Court, such Cali-

power of the state becomes concurrent with a power of the federal government was developed during the so-called Prohibition Era of the 18th Amendment and the Volstead Act, 41 Stat. at L. 305, Ch. 83, Acts 66th Cong., 1st Sess. As in the case of foodstuffs, the regulation of the traffic in liquor has long been a traditional police power of the states. *Vigliotti v. Pennsylvania*, 258 U.S. 403, 66 L.Ed. 686, 42 S.Ct. 330 (1921); *United States v. Lanza*, 260 U.S. 377, 67 L.Ed. 314, 43 S.Ct. 141 (1922). The text of the 18th Amendment was as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." (Emphasis added).

Section 2 of the 18th Amendment spoke of concurrent "power" of the Congress and the several states, whereas the language of 21 U.S.C. section 678 is concurrent "jurisdiction." It is reasonable to treat the two terms as synonymous.

The word "jurisdiction" has been defined to be, among other things, the "power to declare and enforce the law," 50 C.J.S. 1091. The term "concurrent powers" has been defined as political powers exercised independently in the same field of legislation by both federal and state governments. 8 *Words and Phrases*, 608 *et seq.* A "concurrent power excludes the idea of a dependent power. . . ." Mr. Justice McLean in the *Passenger Cases*, 7 How. 283, 399, 12 L.Ed. 702, 750 (1849).

In *Wedding v. Meyler*, 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570, 66 L.R.A. 333 (1903), and in *Nielsen v. Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1908), "Concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio River by the Virginia Compact, and respectively to Washington and Oregon over the Columbia River by Act of Congress. It was decided that such concurrent jurisdiction conferred equality of powers, and that neither state could override the legislation of the other.

The nature of the respective powers of the state and federal governments to regulate at the local level was outlined by

fornia standards were "in addition to or different than" the federal standards.³¹ The basic factor causing the difference between the California and federal standards, according to the Court, is the statistical sampling and the use of average weight or measure of the packages in a lot in accordance with Article 5.³²

2. Provisions as to Concurrent Jurisdiction in 21 U.S.C. 678.

Assuming *arguendo* that the States are preempted under section 678 from imposing "marking, labeling, packaging, or ingredient requirements" (frequently lumped together as "labeling") that are "in addition to, or different than," the provisions of the Act, the preemption provision takes nothing away from the concept of *concurrent jurisdiction* granted by Congress to the States in the same section of the statute as to regulating against adulteration and misbranding.

Mr. Justice Taft in *United States v. Lanza*, *supra*, 260 U.S. 377.

In stressing that the power of the states to enforce prohibition did not originate in the 18th Amendment the court stated:

"To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, *each state possessed that power in full measure prior to the Amendment*, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of countrywide prohibition, state power would be excluded . . ." (Emphasis added). 260 U.S. at page 381.

Likewise here the probable purpose of declaring, in 21 U.S.C. 678, that the states should be vested with concurrent jurisdiction at the distribution level to prevent the misbranding of packages of meat, was to "negative any possible inference" that state power [which existed long before the Federal Wholesale Meat Act] would be excluded.

³¹Pet. App. 29.

³²Pet. App. 28 and 48.

If the supremacy of the federal government in dealing with adulteration and misbranding had been intended, thereby subordinating the longstanding police power of the States, it would have been directly declared in section 678. The Congress had the whole vocabulary of the English language to draw upon in shaping the terminology of section 678.

Assuming again *arguendo* that there is federal preemption as to labeling in section 678, such preemption has little meaning in the case at bar. Labeling is a matter of format, not of substance behind the label. Jones has not imposed any labeling requirements. He has not told the respondents what kind of label to put on their food packages, nor what to say on the label, nor what the size or style of the label should be. The respondents are not required by the State to have a label, but if they do, it must be an honest one. All Jones requires is that the label be not false, misleading or deceptive to the consumer in its statement of the net weight of the product to which the label is attached. Jones is merely enforcing the legitimate interest of the State in preventing unfair competition and ensuring that the purchaser gets the product quantity that the package label represents to him when he buys a package of bacon or flour, or any other commodity bearing a label statement as to "net weight." Jones must enforce this requirement under Business and Professions Code section 12211 to prevent misbranding.

Likewise, the State has not imposed any packaging or ingredient requirements. It has not told the respondents what kind, size or shape of package to use. Nor has it indicated what kind of ingredients to put in the package. The only basis on which the food packages

were ordered off sale was the violation of Business and Professions Code section 12211, the California misbranding statute, which prevents unfair competition and fraud on purchasers.

3. The Detention Provisions of 21 U.S.C. 672 Support the Grant of Concurrent Jurisdiction to the States.

Under 21 U.S.C. 672,³³ a meat food product is subject to Federal detention if "there is reason to believe that any such article is *adulterated or misbranded* and is capable of use as human food, or that it has not been inspected, in violation of the provisions of subchapter I of this chapter or of any other Federal law or the *laws of any State* or Territory, or the District of Columbia . . ." (Italics added). The italicized words indicate an explicit recognition by Congress of the validity of State laws with respect to adulteration and misbranding.

In *United States of America v. 500 Pounds, More or Less, of Veal and Beef*, 319 F.Supp. 966 (N.D.

³³§672. "Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any authorized representative of the Secretary upon any premises where it is held for purposes of, or during or after distribution in, commerce or otherwise subject to subchapters I or II of this chapter, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, *in violation of the provisions of subchapter I of this chapter* or of any other Federal law *or the laws of any State* or Territory, or the District of Columbia, or that such article or animal has been *or is intended to be, distributed in violation of any such provisions*, it may be detained by such representative for a period not to exceed twenty days, pending action under section 673 of this title or notification of any Federal, State, or other governmental authorities having jurisdiction over such article or animal. . . ." (Italics added).

Cal. 1970), the Court construed the language authorizing detention in certain cases under Section 672:

"What are these cases? One arise when the product inspected does not violate the standards of the Department of Agriculture, but does contravene the valid rules of another federal agency, or of a *State* or Territory. In such cases, the Department is authorized by Section 672 to detain the product for a limited time to give the other jurisdiction(s) the chance to proceed against it" (*Italics added*).

A reasonable construction of section 672 is that the State laws referred to in the section include the laws concerned with adulteration (wholesomeness) and misbranding, both being parts of the same coin. Adulteration and misbranding are the central parts of both the federal and State food inspection laws involved in this proceeding. There can be little doubt, of course, that the framers of the statute were seriously concerned with the laws dealing with unwholesomeness. The language used in section 672 in reference to "dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine" is reminiscent of the horrendously unwholesome conditions existing in segments of the meat packing industry prior to the passage of the Wholesome Meat Act of 1967.³⁴

If the framers of the Wholesome Meat Act were genuinely concerned with preserving the integrity of

³⁴"A current Department of Agriculture survey of packing and processing facilities in non-Federal inspected meat plants shows the existence of appalling conditions. For example the report shows that contaminated meat, meat from diseased animals, hides, carcasses, animal entrails, flies, and other absolutely unsanitary and thoroughly disgusting items find their way into processed meats. The existence of such conditions is deplorable. The passage of legislation that will not eliminate all the unsanitary conditions and assure the public the highest quality of products is not meeting our full responsibility." Representative Feighnan, *Congressional Record*, 10/31/67, p. 30517.

State laws in the application of the provisions of section 672, then it stands to reason that they were equally so concerned when drafting the terms of section 678. Otherwise the use of the words "exercise concurrent jurisdiction" in section 678 is an exercise in futility and both sections 672 and 678 become meaningless. This would conflict with the fact, as derived from the legislative history, that the framers of the Wholesome Meat Act intended to preserve the responsibilities and functions of the States. The words of the federal statute are much too clear to permit an interpretation that Congress meant to preempt the laws of the States regulating the distribution of commodities to prevent the evils of adulteration and misbranding.

"A Federal-State relationship is maintained [by the bill] that closes the loopholes without infringing significantly upon responsibilities and agencies of the respective states." Senator Montoya, one of the Senate sponsors of the 1967 bill, *Congressional Record*, 10/31/67, p. 35354.

Conclusion.

For all of the reasons stated, the decisions of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

RAY T. SULLIVAN, JR.,
County Counsel,
Riverside County, California,

LOYAL E. KEIR,
Deputy County Counsel,

Counsel for Petitioner, Joseph W. Jones, Director of Department of Weights and Measures, County of Riverside, California.